Supreme Court, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

Supreme Court, U.S.
FILED
MAY 17 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

41 pp

QUESTIONS PRESENTED

1. Whether the refusal of the Oregon courts to review compensatory damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the punitive damages imposed in this case are excessive.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED . . . . . (I)

TABLE OF AUTHORITIES iii

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

A. The Due Process Clause Requires Judicial Excessiveness Review Of A Jury's Award Of Compensatory Damages 6

B. The Punitive Award In This Case Is Excessive 10

CONCLUSION 16

TABLE OF AUTHORITIES

Cases — Pages

Artrip v. *American Honda Motor Co., Inc.*, No. F87-00265 (N.D. Ind.) 11

BMW of North America, Inc. v. *Gore*, No. 94-896 . . . . . *passim*

Brownwood v. *Honda Motor Co.*, No. 92-1445-Civ-T-24(C), (M.D. Fla. Jan. 12, 1995) 14

Crookston v. *Fire Ins. Exchange*, 817 P.2d 789 (Utah 1991) 13

Ferris v. *American Honda Motro Co., Inc.*, C672437 (Los Angeles Cty. Super. Ct.) 11

Gosewisch v. *American Honda Motor Co., Inc.*, No. 199193 (Ariz. Super. Ct. Nov. 28, 1983 14

Gosewisch v. *American Honda Motor Co., Inc.*, No. 199193 (Ariz. Super. Ct. Sept. 21, 1988) 14

Honda Motor Co., Ltd. v. *Oberg*, 114 S. Ct. 2331 (1994) 2-7

Hopkins v. *American Honda Motor Co.*, Nos. 92-1432-CIV-T-24(B), 94-360-CIV-T-25(B), (M.D. Fla. Nov. 2, 1994) 14

LaPlante v. *American Honda Motor Co.*, 27 F.3d 731 (1st Cir. 1994) 14

TABLE OF AUTHORITIES - Continued

Pages

Lute v. *Honda Suzuki of Jackson*, No. 93-CI-178 (Ohio Ct. Common Pleas Nov. 3, 1994) 14

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 12, 13

TXO Prod. Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) 7

United States v. *American Honda Motor Co.*, 143 F.R.D. 1 (D.D.C. 1992) 15

Utt v. *Honda Motor Co., Ltd.*, No. 93-3157-CV-S-4 (W.D. Mo. Jan. 17. 1995) 14

Statutes

28 U.S.C. § 1257(a) 1

46 Fed. Reg. 47166 (1991) 15

Miscellaneous

A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) 8

Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 246 (1989) 8

Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) 8

TABLE OF AUTHORITIES - Continued

Pages

J. Frank, *Law and the Modern Mind* 177-178 (1949) 8

Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158 (1958) 8

M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987) 8

In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

Petition for a Writ of Certiorari to the Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Oregon Supreme Court on remand from this Court (App., *infra*, 1a-13a) is reported at 320 Or. 544 and 888 P.2d 8.

JURISDICTION

The decision of the Oregon Supreme Court was rendered on February 2, 1995, and a timely petition for reconsideration was denied on March 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

At an earlier stage of this case, the Court held in *Honda Motor Co., Ltd.* v. *Oberg*, 114 S. Ct. 2331 (1994) ("*Oberg I*"), that the Due Process Clause requires judicial review for excessiveness of punitive damage awards; the Court found Oregon's denial of such review unconstitutional. On remand from this Court, the Oregon Supreme Court nevertheless held that judicial review of *compensatory* damages verdicts remains unavailable in Oregon; it accordingly failed to consider the claim that the compensatory damages in this case are excessive. That conclusion plainly was wrong. In addition, on remand the court below upheld the $5 million punitive award in this case, rejecting an excessiveness claim that is similar in many respects to the one now before the Court in *BMW of North America, Inc.* v. *Gore*, No. 94-896. As to that issue, it would be appropriate (if the Court does not grant review to consider the issue of review of compensatory damages) for the Court to hold this petition and dispose of it as appropriate in light of the decision in *Gore*.

1. Respondent Karl Oberg was injured after a three-wheeled all-terrain vehicle ("ATV") manufactured and sold by petitioners (collectively "Honda")[1] overturned on him while he was attempting to ride up a steep embankment. He subsequently brought this suit against Honda, demanding $19,390.39 in special damages (his medical expenses), $900,000 in compensatory general damages (principally for pain and suffering), and $5 million in punitive damages. See *Oberg I*, 114 S. Ct. at 2334. The case was tried to a jury, which was presented with evidence purporting to show that tens of thousands of persons suffered injuries associated with ATV use. *E.g.*, Tr. 21:2377-2379. Counsel for Oberg emphasized this evidence repeatedly during summations (see

---

[1] A complete listing of Honda Motor Co., Ltd.'s, subsidiaries is set forth at Pet. App. 15a-18a.

Tr. 24:2792, 24:2914-2915) and expressly urged the jury to punish Honda for causing those injuries (Tr. 24:2760):

> [Y]ou have the job of sending a message on behalf of hundreds, maybe thousands of other victims who have been or who may yet be injured by three-wheeled vehicles, a message to these defendants that that product is unsafe, that their conduct with respect to that product has not been up to par, that we believe their conduct has been so far from par that it is wanton and reckless.

Oberg's counsel also emphasized during his closing argument that Honda's net worth was some $4.9 billion. Tr. 24:2838.

At the close of trial, the judge instructed the jury as follows regarding the amount of compensatory damages it could award: "The law does not furnish you with any fixed standard by which to measure the exact amount of general damages. The law does require that all compensation allowed be reasonable. You must apply your own considered judgment to determine the amount." Tr. 24:2942. The court added that in calculating general damages the jury should consider "all past physical and mental pain and suffering," "the extent to which plaintiff's injuries will impair his ability to work and perform labor in the future," "any interference with plaintiff's normal and usual activities," and "the amount of future medical treatment" likely to be sought by the plaintiff. *Ibid.*[2]

The jury awarded Oberg the $919,390.39 in compensatory damages and $5 million in punitive damages sought in the complaint. Because the jury found Oberg 20%

---

[2] The jury was instructed that in setting a punitive award it could consider, among other things, "the duration of [Honda's] misconduct" and "the financial condition of the defendant[s]." *Oberg I*, 114 S. Ct. at 2334 n.1. The jury also was charged that special damages include "[t]he reasonable value of medical care and services furnished in the treatment of plaintiff." Tr. 24:2943.

at fault, the trial court reduced the compensatory award to $735,512.31 pursuant to Oregon's comparative negligence statute. See *Oberg I*, 114 S. Ct. at 2334.

Honda then filed motions for a new trial and for judgment notwithstanding the verdict, arguing that the compensatory and punitive verdicts were excessive. The trial court denied the motions without comment. The Oregon Court of Appeals affirmed the judgment, concluding that the Oregon Constitution prohibits both trial and appellate courts in that State from setting aside a verdict on the ground that it is excessive. 814 P.2d 517, 524 (1991). The Oregon Supreme Court affirmed in turn on the same ground. 851 P.2d 1084 (1993). See *Oberg I*, 114 S. Ct. at 2334.

Honda then filed a petition for certiorari, presenting the question "[w]hether Oregon's denial of any judicial review of compensatory and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." No. 93-644, Pet. i. This Court granted the petition, reversed the judgment of the Oregon Supreme Court, and remanded for further proceedings, explaining:

> A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury.

114 S. Ct. at 2342. In reaching this conclusion the Court emphasized the long history of judicial excessiveness review; while the Court did not expressly address the question whether the Due Process Clause requires judicial review of the amount of compensatory damages awarded by a jury, it

noted that "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." *Id.* at 2336 n.2.

2. On remand Honda filed supplemental briefs (1) proposing an appropriate standard for reviewing punitive damages awards; (2) asserting that this Court's analysis in *Oberg I* mandates the conclusion that state courts must review the size of compensatory as well as punitive damages; (3) requesting a further remand so that the trial court could consider Honda's excessiveness claims in the first instance; and (4) explaining briefly why Honda has powerful arguments that the compensatory and punitive damages in this case are in fact excessive. But the Oregon Supreme Court, disregarding those submissions, reinstated the punitive and compensatory awards without modification. App., *infra*, 1a-13a.

The Oregon Supreme Court began by stating the standard for reviewing punitive damages that it believed to be compelled by the Due Process Clause. The court held that "the legal standard to apply to post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in light of the record as a whole?" *Id.* at 7a. The court declined to "extend" this approach to the award of compensatory damages, however, stating that such awards remain unreviewable in Oregon. *Id.* at 4a n.6.

Applying its rationality standard to the record here, the Oregon Supreme Court next declined to disturb the punitive award. The court pointed to evidence in the record purporting to show that Honda knew its ATVs were likely to cause injuries, that Honda was aware that "ATVs were experiencing accidents and tipovers," that "an agency of the United States government undertook to investigate the safety of ATVs," that "defendants profited from sales of ATVs that

defendants knew or should have known were inherently dangerous," that "numerous injuries were occurring from the use of ATVs and that many of those injuries resulted from rearward tipovers," and that "defendant manufacturer's net worth was $4.9 billion at the time of trial." App., *infra*, 10a-11a. The court found that this evidence justified the $5 million punitive award.

Honda then filed a petition for reconsideration asking the court to revisit its "holding that the amount of compensatory damages remains unreviewable in Oregon." Reh'g Pet. 2 n.2. The petition also argued that the Oregon Supreme Court's decision on punitive damages "overlooks a crucial element of the rationality calculus — the fact that numerous other persons injured while using ATVs manufactured by Honda would have as much right to bring suit and seek punitive damages as Oberg did." Reh'g Pet. 3. On the latter point, the petition noted that this Court recently had granted review in *BMW of North America, Inc.* v. *Gore*, No. 94-896, 115 S. Ct. 932 (1995), and that the "decision in *Gore* may provide guidance on the proper administration of punitive damages in the mass tort context." Reh'g Pet. 4 n.3. The court below nevertheless denied the petition for reconsideration without opinion. App., *infra*, 14a.

REASONS FOR GRANTING THE PETITION

A. The Due Process Clause Requires Judicial Excessiveness Review Of A Jury's Award Of Compensatory Damages

Although this Court did not expressly address the point in *Oberg I*, it had granted review in that case on the question whether the Due Process Clause requires judicial excessiveness review of compensatory as well as punitive damages verdicts. And the Court's analysis in *Oberg I* compels the conclusion that such review is constitutionally mandated. The Court's holding that due process principles require review of punitive awards turned in large part on the

finding that judicial review is a "traditional procedure[]" (114 S. Ct. at 2335) that historically has been regarded as an essential check on jury error. See *id.* at 2335-2338. Moreover, as the Court explained, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the twentieth century." *Id.* at 2336 n.2. Because judicial review of compensatory awards for excessiveness was provided in every common law jurisdiction prior to the ratification of the Fourteenth Amendment to the United States Constitution — "the 'crucial time for present purposes'" (*id.* at 2342 n.12 (citation omitted)) — such review must be regarded as a "basic procedural protection[]" that is guaranteed by the Due Process Clause. See also *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2727 (1993) (Scalia, J., joined by Thomas, J., concurring) ("[p]rocedural due process also requires, I am certain, * * * judicial review of the reasonableness of jury-awarded compensatory damages (including damages for pain and suffering)").

The other considerations cited by the Court in *Oberg I* confirm this conclusion. The Court noted that "the rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries." 114 S. Ct. at 2340. Speaking of punitive damages, the Court also recognized that "[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Id.* at 2340-2341.

These factors plainly bear on the compensatory award in this case. While jury discretion is substantially restricted where special damages (such as medical bills or lost earnings) are concerned, the factors that may lead juries astray when awarding punitive damages are equally present when the plaintiff seeks a compensatory award for intangibles such as

pain and suffering. "Medical expense and economic loss do have some objective reality but the warrant to add pain and suffering gives the jury immediate freedom to price the injury subjectively." Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio St. L.J. 158, 161 (1958). Here, for example, the jury was told that "[t]he law does not furnish you with any fixed standard by which to measure the exact amount of general damages." Tr. 24:2942. And bias against corporate defendants may well infect such a compensatory award, a danger that is especially acute when, as in this case, the defendant is a well-known foreign-owned corporation whose net worth has been spread before the jury as part of the punitive damages presentation. As Judge Jerome Frank observed, "[t]hat the defendant is a wealthy corporation and the plaintiff is a poor boy * * * often determine who will win or lose." J. Frank, *Law and the Modern Mind* 177-178 (1949).[3]

This issue is of considerable practical importance. Judicial excessiveness review is an essential safeguard against arbitrary deprivations of property in virtually all cases where damages are sought (and assuredly is crucial in every case

---

[3] Juries thus sometimes "appl[y] evidence incorrectly, award[] compensation for expenses they were not supposed to consider, and consider[] extralegal factors in determining liability and punitive awards." M. Selvin & L. Picus, *The Debate Over Jury Performance: Observations From a Recent Asbestos Case* ix (1987). More generally, it seems clear from the work of social scientists that juries "are occasionally biased against corporate defendants." Greene, *On Juries and Damage Awards: The Process of Decisionmaking*, 52 Law & Contemp. Probs. 224, 246 (1989). See A. Chin & M. Peterson, *Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials* 42-45 (1985) (in personal injury trials, corporate and governmental defendants more likely to be found liable and to be required to pay larger damages); Hans & Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 Law & Human Behavior 151 (1989) (same).

where the damages are unliquidated). Defendants in Oregon are now denied this protection. This preclusion of review affects many thousands of cases each year.[4] Review of the decision below by this Court therefore is in order.[5]

---

[4] Figures provided by the Oregon state court administrator indicate that in 1994 there were more than 4000 personal injury cases, more than 1000 negligence actions, and many hundreds of discrimination, fraud, malpractice, and products liability actions filed in Oregon trial courts.

[5] It should be added that Honda has very substantial arguments that the compensatory award in this case was excessive. Oberg was hospitalized for 10 days after the accident; in the next six months he had only four follow-up visits with his principal treating doctor and thereafter sought no further care until his attorney told him to go in for additional evaluation. Tr. 4:305, 320-321. Although Oberg asserts permanent cognitive impairment, four months after the accident (and prior to plaintiff's lawyer becoming involved in his health care), Oberg's doctor found nothing justifying neurological evaluation and subsequently wrote in his notes, "everything looks quite good." Tr. 4:326-328. Oberg was driving cars, trucks, and dune buggies within three months of the accident. Tr. 4:323, 13:1489. He held and left eight jobs between the time of the accident and the date of trial; he either quit or was terminated for tardiness or misconduct at each. He represented to at least one employer that he had no "conditions, limitations, impairments, or disabilities" that might interfere with satisfactory work performance. Tr. 13:1490-1491; Ex. 252. In 1988, three years after the accident, Oberg told his treating physician that "he was not handicapped in any of his physical activities." Tr. 4:331. Oberg's complaint that he looked "different" after the accident was less than compelling: he testified that "I thought I was a pretty good-looking guy then, and I'm sure people might think I'm good looking now. But I figure I was better looking then than I am now." Tr. 10:1085-1086.

B. The Punitive Award In This Case Is Excessive

While the court below did review the punitive damages, it left intact a punitive exaction that is so excessive as to violate the Due Process Clause. Indeed, the grounds on which Honda challenges the punitive damages here are substantially similar in crucial respects to those advanced by the petitioner in *Gore*, in which the Court recently granted review to consider an excessiveness claim. As in *Gore*, the judgment in this case is based in large part upon injuries suffered by numerous other individuals nationwide, each of whom may be entitled to bring his or her own lawsuit seeking punitive damages for precisely the same conduct that was said to justify the punishment of Honda here. As in *Gore*, it appears that the defendant in this case has been subjected to punishment for actions that were not sanctionable in many of the States where they occurred. And as in *Gore*, all of the relevant objective indicia in this case indicate that the punitive award was excessive. If the Court does not grant review to consider the compensatory damages issue in this case, it therefore would be appropriate for the Court to hold this petition pending disposition of *Gore*.

1. The jury in this case was presented with evidence purporting to show that tens of thousands of persons suffered injuries associated with ATV use. *E.g.*, Tr. 21:2377-2379. Counsel for Oberg emphasized this evidence repeatedly in his closing argument (see Tr. 24:2792, 24:2914-2915) and expressly urged the jury to punish Honda "on behalf of hundreds, maybe thousands of other victims who have been or who may yet be injured by three-wheeled vehicles." Tr. 24:2760. For its part, the court below upheld the punitive award because, among other things, ATV use caused "numerous injuries." App., *infra*, 11a. But this punitive judgment — which is based on a course of conduct that (purportedly) gave rise to many injuries — is fatally flawed because it provides no assurance that Honda will not be sanctioned repeatedly for the impact of its conduct on the

same persons. If Oberg is entitled to a $5 million judgment, others who have been injured by Honda's sale of ATVs presumably are as well. This means that even if Oberg's claim as to the magnitude of the hazard Honda created (tens of thousands of ATV-associated injuries) were substantially discounted, and if it were assumed that a total of 5,000 persons suffered injuries comparable to his in rollover accidents during the period of three-wheeled ATV use, a $5 million award to Oberg could be justified only if total punitive damages of *$25 billion* would not be excessive for Honda's course of conduct. We doubt that even Oberg would make such a claim.

For the reasons explained by petitioner in *Gore* (at No. 94-896, Pet. Br. 45-50), it is no answer to this problem to suggest that Honda may escape multiple punishment because it might not be found liable in other cases.[6] To the contrary, that observation simply highlights the unfairness of the approach taken by the court below. In fact, the jury's finding of punitive liability in this case *is* manifestly aberrational. More than 60 products liability actions against Honda involving ATV accidents have gone to judgment. In a substantial majority of them Honda was found *not liable at all*. And only three juries, including the one in this case, have ever returned verdicts imposing punitive damages against Honda.[7] The other two settled after trial and were not reviewed on appeal; this case thus is the only one in which punitive damages were upheld following appeal.

---

[6] For the reasons also explained by the petitioner in *Gore* (at Br. 47-49), a court cannot avoid this problem by upholding the punishment in the case before it while deferring concerns about excessive, repetitive punishment to future cases.

[7] *Artrip* v. *American Honda Motor Co., Inc.*, No. F87-00265 (N.D. Ind.); *Ferris* v. *American Honda Motor Co., Inc.*, C672437 (Los Angeles Cty. Super. Ct.).

Against this background, it would be perverse to hold that Honda's punishment may be enhanced in this case because its actions caused "numerous injuries" when the actions causing those injuries have themselves been repeatedly found *not* to warrant punishment. Instead, fundamental fairness requires that the plaintiff's recovery be limited to a reasonably apportioned share of total potential punitive liability.

2. The punitive award here also is flawed for a second, related reason: as in *Gore*, the defendant in this case was punished for conduct occurring in other States that was not shown to have been sanctionable where it occurred. The jury here was urged to punish Honda "on behalf of hundreds, maybe thousands of other victims," and the court below upheld the award by pointing to the "numerous injuries" associated with ATV use. But the vast majority of those injuries, of course, occurred outside of Oregon. And as the petitioner in *Gore* explains (at Br. 16-17 n.5), some States do not permit punitive damages at all, while others allow their imposition only in cases where the defendant's conduct was so egregious as to amount to criminality. Against this background, the sort of extraterritorial punishment imposed in this case, which turned on the application of Oregon law to punish conduct that took place in other States even though that conduct may not have been sanctionable under the law of those States, violates the Constitution.

3. Finally, even apart from concerns about multiple or extraterritorial punishment, the punitive award here is excessive because it is far "greater than reasonably necessary to punish and deter." *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991). As also is true in *Gore* (see Pet. Br. 29-44), the punitive judgment in this case bears no reasonable relationship to the actual or potential harm to the plaintiff, to the nature of the defendant's conduct, to the range of penalties that legislatures have provided for similar improprieties, or to any other appropriate criterion for testing the reasonableness of a punishment.

First, the punitive damages here are disproportionate to the harm suffered by the plaintiff. They are 5½ times the jury's valuation of Oberg's injuries (which, we submit, Honda would show to be grossly excessive if given the chance), 20% of which are attributable to Oberg's own negligence. While a somewhat lower ratio (4:1) was said to be "close to the line" separating constitutional from unconstitutional punishment in any case (*Haslip*, 499 U.S. at 23), it is especially troubling where, as here, repetitive punishment is possible. Moreover, the $5 million punitive damages award is more than *500* times Oberg's economic damages.[8]

Second, the conduct for which Honda has been punished — selling ATVs with knowledge that a certain number of people inevitably would be injured riding them — is minimally reprehensible. In fact, when looked at in terms of injuries per vehicle, ATVs are no more dangerous than minibikes, trailbikes, and snowmobiles. See Tr. 21:2408, 2410. It therefore is no surprise that several courts have concluded *as a matter of law* that Honda's conduct with regard to ATVs was not sufficiently egregious to justify submitting a punitive damages claim to a jury at all. See, *e.g.*, *LaPlante* v. *American Honda Motor Co.*, 27 F.3d 731, 745 (1st Cir. 1994) ("no reasonable juror could have found, at the close of plaintiff's punitive damages evidence, that Honda acted maliciously, in bad faith, or with the intent to

---

[8] Where, as here, the compensatory damages are composed largely of "soft" — that is, non-economic — damages, the permissible ratio of punitive to compensatory damages generally should be smaller than if the compensatory damages are essentially all "hard" damages. See *Crookston* v. *Fire Ins. Exchange*, 817 P.2d 789, 811-812 & n.29 (Utah 1991). Alternatively, overpunishment could be avoided by requiring that punitive damages bear a reasonable relationship to economic (special) damages.

cause harm"); *Hopkins* v. *American Honda Motor Co.*, Nos. 92-1432-CIV-T-24(B), 94-360-CIV-T-25(B), Opinion at 7 (M.D. Fla. Nov. 2, 1994) ("[i]t is hard to believe that, if the ATV's were so dangerous that their distribution satisfied Florida's standard for punitive damages, Judge Gesell would have approved the settlement and left them on the market"); *Brownwood* v. *Honda Motor Co.*, No. 92-1445-Civ-T-24(C), Order at 9 (M.D. Fla. Jan. 12, 1995) ("[t]he Defendant's behavior fails to evidence the character of negligence necessary for imposing punitive damages").[9]

Indeed, while the court below upheld the punitive award in this case on the ground, among others, that "an agency of the United States government undertook to investigate the safety of ATVs" (App., *infra*, 10a), the court failed to note that the agency (the Consumer Product Safety Commission) ultimately entered into a consent decree with Honda on terms that did *not* involve any recall of ATVs. As Judge Gesell of the United States District Court for the District of Columbia explained in approving the settlement:

> [T]he government's decision to settle was made deliberately, after reviewing extensive factual materials and receiving expert, disinterested advice. * * * [T]he government candidly states that its ultimate prospects in the litigation remain uncertain because there are both factual and novel legal obstacles to overcome. This is a correct appraisal.

United States v. *American Honda Motor Co.*, 143 F.R.D. 1, 6 (D.D.C. 1992). The CPSC subsequently terminated its

---

[9] See also *Utt* v. *Honda Motor Co., Ltd.*, No. 93-3157-CV-S-4 (W.D. Mo. Jan. 17. 1995) (claim for punitive damages dismissed); *Lute* v. *Honda Suzuki of Jackson*, No. 93-CI-178 (Ohio Ct. Common Pleas Nov. 3, 1994) (same); *Gosewisch* v. *American Honda Motor Co., Inc.*, No. 199193 (Ariz. Super. Ct. Sept. 21, 1988) (same).

investigation of ATVs without taking any action against them — expressly declining to label them hazardous products that should be banned, recalled, or repaired. See 46 Fed. Reg. 47166 (1991). Whether or not the CPSC's case had any merit at all, its concession that its position was no better than debatable makes clear that Honda did not act unreasonably in resisting the Commission's regulatory efforts.

Third, other objective indicia point toward the conclusion that the punitive award here is excessive. At the time it was returned, the verdict in this case was significantly larger than any other reported punitive verdict in Oregon history. Similarly, the punitive judgment exceeds by a factor of 50 the maximum fine for equivalent *criminal* conduct. See ORS 163.185 (maximum fine of $100,000 for criminal assault).

In sum, given the similarities between this case and *Gore*, it would be appropriate (if the Court does not grant review to resolve the compensatory damages claim) for the Court to hold the petition in this case pending disposition of *Gore*, and to vacate the decision below if the petitioner prevails in *Gore*. Alternatively, if the Court does not reach the excessiveness issue in *Gore*, this case presents an excellent opportunity for addressing that extremely important question in the multiple victim context.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold the petition pending disposition of *BMW of North America, Inc.* v. *Gore*, No. 94-896, and should dispose of this case as appropriate in light of the decision in *Gore*.

Respectfully submitted.

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

MAY 1995

APPENDIX A

Karl L. OBERG, Respondent on Review,

v.

HONDA MOTOR CO., LTD.; Honda R & D Co., Ltd.; and American Honda Motor Co., Inc., Petitioners on Review.

CC A8709-05897; CA A61587, USSC 93-644; SC S38436.

Supreme Court of Oregon, In Banc.

Argued and Submitted Sept. 12, 1994. Decided Feb. 2, 1995.

GRABER, Justice.

This case is before us on remand from the Supreme Court of the United States. *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. ___, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994).

INTRODUCTION

This civil case involves a product liability claim against defendants, who manufactured and sold a three-wheeled all-terrain vehicle (ATV) used by plaintiff. The ATV flipped over backwards while plaintiff was riding it, and plaintiff suffered multiple injuries. A jury returned a verdict in favor of plaintiff, awarding both general and punitive damages. Defendants appealed to the Court of Appeals, which affirmed the judgment. *Oberg* v. *Honda Motor Co.*, 108 Or.App. 43, 56, 814 P.2d 517 (1991). On review to this court, we also affirmed. 316 Or. 263, 289, 851 P.2d 1084 (1994). The facts are set forth in more detail in those opinions.

As now pertinent, defendants argued in their earlier appearance before this court that, under the Due Process

Clause of the Fourteenth Amendment to the Constitution of the United States,[1] an award of punitive damages must be subject to post-verdict judicial review for excessiveness. 316 Or. at 275, 851 P.2d 1084. They reasoned that, because the Oregon Constitution had been interpreted to preclude post-verdict judicial review of an award of punitive damages, the procedure followed by the Oregon courts did not comport with the requirements of federal procedural due process. This court stated that Article VII (Amended), section 3, of the Oregon Constitution,[2] prevents Oregon trial and appellate courts from reviewing awards of punitive damages.[3] *Id.* at 275-76, 851 P.2d 1084. This court held that, despite that restriction, Oregon's procedure complied with the dictates of

---

[1] The Fourteenth Amendment to the Constitution of the United States provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]"

[2] Article VII (Amended), section 3, of the Oregon Constitution, provides in part:

> "In actions at law, where the value in controversy shall exceed $200, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict."

[3] This court is mindful that Article VII (Amended), section 3, vests authority in this court to determine "what judgment should have been entered in the court below." However, because this court has used that authority in rare instances, *Whinston* v. *Kaiser Foundation Hospital*, 309 Or. 350, 358, 788 P.2d 428 (1990), and because review of punitive damages awards in a court of discretionary review would be impractical, we do not consider further that authority.

federal procedural due process under then-existing Fourteenth Amendment jurisprudence. *Id.* at 283-89, 851 P.2d 1084.

On *certiorari*, the Supreme Court of the United States reversed. The Supreme Court held that "Oregon's denial of judicial review of punitive damages awards violates the Due Process Clause of the Fourteenth Amendment." *Honda Motor Co.*, ___ U.S. at ___, 114 S.Ct. at 2341. The Supreme Court went on to state:

> "A decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment. The common law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice, all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury." *Id.* at ___, 114 S.Ct. at 2342.

The Supreme Court did not address "the more difficult question of what standard of review is constitutionally required." *Id.* at ___ n.10, 114 S.Ct. at 2341 n.10. The Supreme Court left that question to us.

On remand, then, our task is twofold. First, we must identify a standard of post-verdict judicial review of awards of punitive damages that complies with the federal constitution. Then, we must apply that standard to the case before us.

Article VII (Amended), section 3, of the Oregon Constitution, quoted in note 2 *ante*, prohibits a court from re-examining a fact tried by a jury unless there is no evidence to support the jury's verdict. In *Van Lom* v. *Schneiderman*, 187 Or. 89, 116, 210 P.2d 461 (1949), this court held that an assessment of punitive damages is a question of fact

committed to the decision of a jury, to which Article VII (Amended), section 3, applies.[4] Therefore, a trial or appellate court is prohibited from reviewing an award of punitive damages if there is evidence in the record to support a jury's finding that punitive damages should be awarded. *Id.* at 110-13, 210 P.2d 461. It is that aspect of the holding in Van Lom, construing Article VII (Amended), section 3, that comes into direct conflict with the decision of the Supreme Court of the United States in this case, concerning the requirements of federal due process. Under the Supremacy Clause,[5] we are bound to follow the requirements of federal due process in the face of that conflict.

On remand, we hold that the standard for post-verdict judicial review of an award of punitive damages is as follows:[6] A jury's award of punitive damages shall not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole; the range that a rational juror would be entitled to award depends, in turn, on the statutory and common law factors that allow an award of punitive damages for the specific kind of claim at issue. We also hold that the award of punitive damages in this case was not excessive, when reviewed under the foregoing standard.

---

[4] The court in *Van Lom* referred to Article VII (Amended), section 3, as "Article VII, section 3." The people adopted Article VII (Amended), section 3, in 1910, by initiative petition.

[5] Article VI of the Constitution of the United States provides in part:

> "This Constitution * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[6] This holding is limited to awards of punitive damages and does not extend to compensatory damages.

THE STANDARD FOR POST-VERDICT JUDICIAL REVIEW

As discussed above, the Supreme Court of the United States held in Oberg that the Due Process Clause of the Fourteenth Amendment requires post-verdict judicial review of awards of punitive damages. ___ U.S. at ___, 114 S.Ct. at 2341. In reaching its conclusion, the Supreme Court noted that, "[i]n the federal courts and in every State, except Oregon, judges review the size of damage awards." *Id.* at ___, 114 S.Ct. at 2338. The Court then stated that "traditional practice provides a touchstone" for what is required by procedural due process. *Id.* at ___, 114 S.Ct. at 2339.

The Court's discussion of traditional practice, from the era of George III to "modern practice," describes the proper procedure to be followed when it is asserted that a jury's award of punitive damages is excessive. *Id.* at ___ - ___, 114 S.Ct. at 2335-38. By contrast, the Court does not spell out what *standard of review* is required by federal procedural due process. Two passages in *Oberg* offer some guidance, however. First, the Court, in rejecting plaintiff's argument that Oregon provided adequate post-verdict review of a jury's award of punitive damages (because a trial judge or an appellate court can overturn an award of punitive damages if there is no evidence to support such an award, or if the jury was improperly instructed before it gave the award), stated:

> "What we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing *at least a rational basis for the particular* deprivation of property imposed by the State to deter future wrongdoing." *Id.* at ___, 114 S.Ct. at 2339 (emphasis added).

Second, in a footnote, the Court stated:

> "This case does not pose the more difficult question of what standard of review is constitutionally required. Although courts adopting a more deferential approach use different verbal formulations, there may not be much practical difference between review which focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of the standard this Court articulated in *Jackson* v. *Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2792, 61 L.Ed.2d 560 (1979) (whether 'no rational trier of fact could have' reached the same verdict)."[7] *Id.* ___ U.S. at ___ n. 10, 114 S.Ct. at 2341 n. 10.

In those two brief statements, the Supreme Court suggests that a form of post- verdict judicial review that asks whether "a rational basis" exists for the particular amount of punitive damages assessed, or a form of post-verdict judicial review that asks whether a "rational trier of fact" could assess the same award, would meet the requirements of the Due Process Clause. Both of those standards are related to the evidence in the record; some rational nexus must exist between the award and the evidence in the record.

There is a range of punitive damages that a reasonable jury may assess in a given case, and an assessment of damages that exceeds that range results in a deprivation of

---

[7] *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), addressed the appropriate standard of review in federal habeas corpus proceedings resulting from a claim of insufficient evidence to support a state criminal conviction. The Court stated that "the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 324, 99 S.Ct. at 2791-92.

property that is a substantive due process violation.[8] A court, trial or appellate, reviewing an award of punitive damages thus engages in post-verdict review (a procedural due process safeguard) to ensure that the award is within the permissible range of damages (which is limited by substantive due process concerns).

With the above considerations in mind, we hold that the legal standard to apply to post-verdict judicial review of a jury's award of punitive damages is as follows: Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole? The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim.

RESOLUTION OF THE PRESENT CASE

Although the trial court did not apply our newly announced standard in the first instance here, we choose not to remand this case, for three reasons. First, on remand from

---

[8] The Supreme Court of the United States recognized the existence of such a range. Discussing *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. ___, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993), the Court in *Oberg*, ___ U.S. at ___, 114 S.Ct. at 2335, stated:

> "Our recent cases have recognized that the constitution imposes a substantive limit on the size of punitive damage awards. Although they fail to 'draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,' a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damage awards. A plurality in TXO assented to the proposition that 'grossly excessive' punitive damages would violate due process." (Citations omitted.)

the Supreme Court of the United States, this court has *552 resolved questions of law and has determined how Oregon law will comport with the requirements newly articulated by the Supreme Court. We are in as good a position as would be the trial court to apply a legal standard to the evidence in the record. Second, by applying that new standard to the facts in this case, we may be able to give some guidance to trial courts that will need to follow this standard in the future. Third, the judgment was entered more than five years ago; we see no reason to delay the final resolution of this case any longer.[9]

Considering the record as a whole, we hold that the award of punitive damages in this case is within the range

---

[9] Our decision to resolve this case here, rather than remand it to the trial court, indicates that an appellate court may conduct post-verdict review, on the merits, of an award of punitive damages, even though the trial court has not done so. We note, therefore, that the Court of Appeals may (when appropriate) conduct such a review of cases that already have been tried and that now are, or will be, on appeal.

The foregoing paragraph should not be read to suggest, however, that the issue may be *raised* for the first time on appeal, without some objection or challenge to an award of punitive damages having been made, on the ground of excessiveness, in the trial court. In this case, there is no question that defendants raised the issue at trial in a timely and appropriate manner. Defendants moved for a directed verdict regarding the punitive damages claim (both at the close of plaintiff's case and at the close of all the evidence), ORCP 60, and moved for judgment notwithstanding the verdict, ORCP 63. They then challenged the jury's award of punitive damages, as excessive, by means of a motion for a new trial under ORCP 64 B(5). That rule of procedure provides for setting aside a judgment and granting a new trial when the evidence is insufficient to justify the verdict or when the verdict "is against law."

that a rational juror would be entitled to award.[10] Our analysis is as follows.

As noted, plaintiff brought a product liability claim against defendants. The substantive criteria to be considered by an Oregon factfinder in deciding whether to make an award of punitive damages in a product liability action and, if so, in setting the award, are set out in ORS 30.925:

"(1) In a product liability civil action, punitive damages shall not be recoverable unless it is proven by clear and convincing evidence that the party against whom punitive damages is sought has shown wanton disregard for the health, safety and welfare of others.

"(2) During the course of trial, evidence of the defendant's ability to pay shall not be admitted unless and until the party entitled to recover establishes a prima facie right to recover under subsection (1) of this section.

"(3) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

---

[10] Because the award of punitive damages in this case is permissible, we need not, and do not, decide what procedures the trial court should follow when an award of punitive damages is excessive.

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

At trial, plaintiff presented evidence that permitted a jury to conclude, by clear and convincing evidence, that defendants acted with wanton disregard for the health and safety of others. ORS 30.925(1). From the evidence, a reasonable jury could conclude that punitive damages should be awarded. There also was evidence respecting the criteria listed in ORS 30.925(3).

Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death. *See* ORS 30.925(3)(a) & (b) (stating relevant standards). The jury heard evidence that defendants, from the time when they developed and began manufacturing ATVs, failed to conduct adequate safety testing of those products for stability and crashworthiness and that defendants failed to consider adequate protections for ATV users against foreseeable roll-over accidents. Evidence was presented that defendants had known from the mid-1970s that ATVs were experiencing accidents and tip-overs; there was evidence that defendants' sales staffs and employees were aware of this. In the early 1980s, the evidence showed, an agency of the United States government undertook to investigate the safety of ATVs. Defendants responded by launching an advertising campaign, advising ATV users to ride safely, and by conducting in-house safety tests that were inadequate to determine potential safety hazards of ATVs.

Plaintiff presented evidence that he suffered serious permanent injuries for which defendants denied responsibility. *See* ORS 30.925(3)(a) & (e) (stating relevant standards). Plaintiff suffered multiple fractures, which required that his eye sockets, cheek bones, jaw, and teeth be wired together. As a result of the accident, plaintiff suffered damage to his inner ear, affecting his balance and cognitive skills; damage to his eye sockets, causing double vision; and damage to his sinuses and deep skeletal structures, causing severe headaches and impairment of mental abilities (including reduced short-term memory). There was evidence that those injuries are permanent.

Plaintiff also presented evidence that defendants' misconduct, which started with the failure to conduct reasonable safety tests of the design of ATVs and was enhanced by defendants' disregard of notices that the product was dangerous, continued for more than 15 years; in that period, defendants profited from sales of ATVs that defendants knew or should have known were inherently dangerous. *See* ORS 30.925(3)(c), (d) & (e) (stating relevant standards). There was evidence that, when plaintiff's injury occurred, defendants had notice, from the federal government agency investigating the safety of ATVs, that numerous injuries were occurring from the use of ATVs and that many of those injuries resulted from rearward tip-overs. According to the evidence, defendants maintained that there was nothing wrong with the design or testing of the product and that there was no reason to add safety mechanisms or to engage in safety tests to avoid the type of accident suffered by plaintiff.

Finally, plaintiff presented evidence showing that defendant manufacturer's net worth was $4.9 billion at the time of trial. ORS 30.925(3)(f) (stating relevant standards).

The jury assessed $919,390.39 as compensatory damages[11] and $5,000,000 as punitive damages. The punitive damages awarded here are not outside the range that a rational juror would be entitled to award in this instance. The Supreme Court of the United States has recognized that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards, but has refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 18, 111 S.Ct. 1032, 1043, 113 L.Ed.2d 1 (1991). In Haslip, the Court recognized that an award that was four times the amount of compensatory damages, and more than 200 times the amount of out-of-pocket expenses, was permissible but "may be close to the line." *Id.* at 23, 111 S.Ct. at 1046. In *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. ___, ___ - ___, 113 S.Ct. 2711, 2722-23, 125 L.Ed.2d 366 (1993), the Court upheld a jury award that was 526 times greater than the out-of-pocket damages awarded.

In this instance, the jury received correct and complete instructions concerning the requirements for awarding punitive damages, thereby receiving adequate guidance from the trial court. The court in turn received its guidance from the legislature and, thus, in this case, the jury also acted with "legislative guidance expressing the considered judgment of the elected representatives of the community." *TXO Production*, 509 U.S. at ___, 113 S.Ct. at 2719. The award of punitive damages is about 5.4 times the award of

---

[11] The jury allocated 20 percent of the fault to plaintiff and 80 percent to defendants. The trial court reduced the award of compensatory damages by 20 percent, to $735,512.31.

compensatory damages, about 528 times the amount of plaintiff's out-of-pocket expenses, and about one-tenth of one percent of defendant manufacturer's net worth.[12] Although that is a large award, it is neither unreasonable nor grossly excessive in the light of the criteria set out in ORS 30.925, the evidence in the record, and the awards upheld against federal due process challenges in *Haslip* and *TXO Production*. A reasonable jury could conclude that this assessment of damages is appropriate to "punish a willful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future." *See State ex rel Young* v. *Crookham*, 290 Or. 61, 65, 618 P.2d 1268 (1980) (stating quoted standard).

The decision of the Court of Appeals is affirmed on different grounds. The judgment of the circuit court is affirmed.

---

[12] Our recitation is descriptive, not prescriptive. We do not suggest that there is some specific, mathematically precise outer limit on punitive damages. See 320 Or. at ___ - ___, 888 P.2d at 11-12, and 320 Or. at ___ n. 8, 888 P.2d at 11 n. 8.

APPENDIX B

IN THE SUPREME COURT OF
THE STATE OF OREGON

KARL L. OBERG, Plaintiff-Respondent, Respondent on Review, Respondent on Reconsideration, v. HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; and AMERICAN HONDA MOTOR CO., INC., Defendants-Appellants, Petitioners on Review, Petitioners on Reconsideration.	)	Multnomah County Circuit Court Case No. A8709-05898 CA A61587 SC S38436 **ORDER DENYING RECONSIDERATION**

The court has considered the petition for reconsideration and orders that it be denied.

Dated this 21st day of March, 1995.

WALLACE P. CARSON, JR.
CHIEF JUSTICE

APPENDIX C

RULE 29.1 LIST OF SUBSIDIARY COMPANIES

HONDA MOTOR CO., LTD. SUBSIDIARIES

Japan

Honda R&D Co., Ltd.
Honda Engineering Co., Ltd.
Yutaka Giken Co., Ltd.
Zaotec, Inc.
Seikigiken Kogyo Co., Ltd.
Asama Giken Co., Ltd.
Honda Buhin Service Co., Ltd.
Denshi Giken Co., Ltd.
Honda Foundry Co., Ltd.
Honda Lock Mfg., Co. Ltd.
Honda Finance Co., Ltd.
Honda Motor Parts Service Co., Ltd.
Honda International Sales Corporation
Honda Access Corp.
Honda Parts Sales Co., Ltd.
Suzuka Circuitland Co., Ltd.
Honda Trading Corporation
Honda Leasing Corporation
Honda Sogo Tatemono Co., Ltd.
Honda Clio Shin Tokyo Co., Ltd.
Honda Racing Corp.
Honda Sun Mfg., Co., Ltd.
Honda Parking Co., Ltd.
Kibounosato Honda Co., Ltd.
Rainbow Motor School
Honda Airway Co., Ltd.
Honda Tokuso Co., Ltd.
Matsuyama Seisakusyo Co., Ltd.
Honda Direct Marketing Co.

North America

American Honda Motor Co., Inc.
Honda North America, Inc.
Honda of America Mfg., Inc.
Indiana Precision Technology, Inc.
American Honda Finance Corporation
Honda International Trading Corp.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Canada, Inc.
Honda de Mexico, S.A. de C.V.

Europe

Honda Austria G.m.b.H.
Honda Europe, N.V.
Honda Belgium N.V.
Honda Motor Europe Limited
Honda of the U.K. Manufacturing Limited
Honda France S.A.
Honda Deutschland G.m.b.H.
Honda R&D Europe G.m.b.H.
Honda Netherlands B.V.
Honda International Finance B.V.
Honda Italia Industrieale S.p.A.
Honda Automobile Italia, S.p.A.
Montesa Honda S.A.
Honda (Suisse) S.A.
Honda Czech Republic, Ltd.
Svenska Honda Bil Import AB
Honda Power Equipment Sweden AB

Brazil

Honda Motor do Brasil Ltda.

Austrialia

Honda Australia Pty. Ltd.

New Zealand

Honda New Zealand Limited

Asia

Prospect Engine Manufacturing
Asian Honda Motor Co., Ltd.
Thai Honda Manufacturing Co., Ltd.
Honda Engine Mfg. Philippines, Inc.
Honda Motor (China) Co., Ltd.
Honda Parts Manufacturing Corp.

Venezuela

Honda Venezuela C.A.

United States of America

Honda North America, Inc.
American Honda Motor Co., Inc.
American Honda Finance Corp.
Honda Trading of America Corp.
Honda of America Mfg., Inc.
Honda R&D North America, Inc.
Honda Engineering North America, Inc.
Honda Power Equipment Mfg., Inc.
Honda Performance Development, Inc.
American Honda Education Corp.
Calhac
Benton Water Supply, Inc.
American Honda Foundation
KTH Parts Industries, Inc.
Bellemar Parts Industries
Findlex Corporation
New Sabina Industries
Tomasco Mulciber
T.S. Trim
Jefferson Industries Corporation
Indiana Precision Technology, Inc.

Yotec
Technical Auto Parts
Jay Tech
Honda All Lock
Midwest Express
Honda Accessory
VSK
American Showa (SCI & BFCM)
Harmony Agricultural Prod.
YUSA
Stanley Electric
Filtech
TFO
Madison Precision
Weastec
Newman Technology
F & P America

Canada

Honda Canada, Inc.
Honda of Canada Mfg., Inc. (Div. of CH)
Honda Canada Finance
F&P Mfg., Inc.
BPI Canada
Yachiyo of Ontario
Honda Trading Canada

Mexico

Honda de Mexico, S.A. de C.V.

Others
Honda Motor de Argentina S.A.
Honda Gulf FZE

FILED
MAY 30 1995
CLERK

No. 94-1890

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HONDA MOTOR CO., LTD.,
HONDA R&D CO., LTD.;
AND AMERICAN HONDA MOTOR CO., INC.,

Petitioners,

v.

KARL L. OBERG

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OREGON

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM A. GAYLORD
Counsel of Record
Gaylord & Eyerman, P.C.
1400 SW Montgomery
Portland, OR 97201
(503) 222-3526

RAYMOND F. THOMAS
Royce, Swanson, Thomas & Coon
621 SW Morrison Street
Portland, OR 97205

Counsel for Respondent

May 30, 1995

19pp

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTION TO THE COMPENSATORY AWARD 6

II. THE SECOND QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTIONS TO THE PUNITIVE AWARD 8

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: **Pages**

Ailes v. Portland Meadows, Inc., 823 P.2d 956 (Or. 1991) 7

Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 4, 9

BMW of North America, Inc. v. Gore, No 94-896 . . . . . 1, 8-10, 13-14

Capital Traction Co. v. Hof, 174 U.S. 1 (1899) 14

Chicago, I. & L. R. Co. v. McGuire, 196 U.S. 128 (1905) 8

Chicago, Burlington & Quincy R. Co. v. Chicago, 166 U.S. 226 (1897) 14

Don't Waste Oregon Comm. v. Energy Facility Siting Council, 881 P.2d 119 (Or. 1994) 7

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 7

Fuller v. Oregon, 417 U.S. 40 (1974) 7

Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994) . *passim*

In re Quinn, 881 P.2d 795 (Or. 1994) 7

Oberg v. Honda Motor Co., 851 P.2d 1084 (Or. 1991), *rev'd*, 114 S. Ct. 2331 (1994) 2, 3

State v. Brown, 800 P.2d 259 (Or. 1980) 7

State v. Bucholz, 855 P.2d 1100 (Or. 1993) 7

State v. Langley, 839 P.2d 692 (Or. 1992) 7

State v. Cunningham, 880 P.2d 431 (Or. 1994), *cert. denied*, 115 S. Ct. 1317 (1995) 7

State v. Pinnell, 877 P.2d 635 (Or. 1994) 7

Street v. New York, 394 U.S. 576 (1969) 7

TXO Production Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) 9

Webb v. Webb, 451 U.S. 493 (1981) 5

Constitutional Provisions, Statutes and Rules: **Pages**

28 U.S.C. § 1257(a) 1, 4, 5

Or. R. App. P. 5.45(2) 7

ORS 30.925(3)(g) 10

Rules 14.1(h) and 14.5 of the Rules of this Court 1

Miscellaneous:

R. Stern, *et al.*, SUPREME COURT PRACTICE § 3.21(c) (7th ed. 1993) 10

INTRODUCTION

The petition for certiorari filed by Honda Motor Co., Ltd. and its affiliates ("Honda") is an ill-disguised effort to use the fortuitous pendency of *BMW of North America, Inc. v. Gore*, No 94-896 (cert. granted Jan. 23, 1995) to postpone by a year or more the date on which the judgment in this decade-old case must be paid. Honda's aim is quite explicit: to have this case "held" through the end of the 1995 Term, and then remanded for months more of proceedings in the Oregon Supreme Court, followed by months of further delay occasioned by a renewed petition for certiorari in this Court. *See* Pet. 2 ("it would be appropriate . . . for the Court to hold this petition and dispose of it as appropriate in light of the decision in *Gore*"); *id* at 10 (it "would be appropriate for the Court to hold this petition pending disposition of *Gore*"); *id.* at 15 ("it would be appropriate . . . for the Court to hold the petition in this case pending disposition of *Gore*, and to vacate the decision below if the petitioner prevails in *Gore*").

Honda's petition should be rejected out of hand because the grounds on which it seeks to have the case held are not grounds that it preserved in the Oregon state court system. Pursuant to 28 U.S.C. § 1257(a), and Rules 14.1(h) and 14.5 of the Rules of this Court, certiorari will be denied unless the petition for certiorari documents, with specific citations to the record, where the federal issues raised in the petition were preserved for review. Honda has ignored that requirement, and it is barred from attempting to make the required jurisdictional showing in its reply brief (which Oberg will be unable to answer). Further, it is clear that Honda did not, in fact, preserve the federal issues that it now seeks to raise.

STATEMENT OF THE CASE

In 1985, while respondent Karl Oberg was driving one of Honda's three-wheel all-terrain vehicles ("ATVs") up a steep hill, the 325-pound vehicle suddenly flipped over backwards on him. It crushed many of the bones in his face and skull, causing serious permanent injuries. *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2334 (1994); Pet. App. 11a. Oberg filed suit, alleging

among other things that the vehicle had flipped due to its inherently dangerous design, that Honda was aware of the dangers, and that Honda nevertheless had promoted the vehicle as safe and failed to warn consumers of the grave dangers posed by ordinary operation of the vehicles.

A notice of proposed rulemaking by the Consumer Product Safety Commission cited ATVs like Honda's as constituting perhaps "one of the most significant and explosively growing product hazards ever considered by this agency."[1] The evidence indicated that Honda was aware of the safety risks but deliberately refused to make scientific tests of safety, to make needed safety improvements of known design flaws, to warn of these dangers, or to recall vehicles that were deceptively unstable and therefore inherently dangerous. Pet. App. 10a-11a.

Honda's defense at trial was that its ATVs were reasonably safe for their intended purpose and that the accident was all Oberg's fault. Although Honda acknowledged that it had promoted the ATV model that Oberg was driving as the "King of the Hill," Honda attacked Oberg as reckless for accepting the opportunity to ride the new model up a short, steep hill. Tr. 3:52. In Honda's view, its vehicles were perfectly safe and it was the riders of the vehicles who were at fault for the tens of thousands of injuries occurring each year. *See, e.g.*, Tr. 3:72-78; Tr. 18:1866-1947; Tr. 25:2864-81. Thus, Honda argued that this case simply involved "a rider who misjudged the technique and misjudged his own ability" to ride up the hill. Tr. 3:91. In arguments to the jury, Honda pursued a strategy of focusing solely on liability and declining to suggest any dollar figure for punitive damages as an alternative to Oberg's request for a $5 million award. Honda simply reiterated its "blame the rider" position that it had done nothing wrong, and thus that no punitive damages at all should be awarded.

---

[1] *Oberg v. Honda Motor Co.*, 851 P.2d 1084, 1106 (Or. 1991) (Peterson, J., dissenting), *rev'd*, 114 S. Ct. 2331 (1994).

The trial judge gave the jury the extensive instructions that are required by Oregon law in product liability actions. *See Oberg*, 851 P.2d at 1095 n.11. The jury was told that punitive damages could be awarded only if Oberg made out his claim by "clear and convincing evidence." *Id.* Honda made no constitutional objection of any kind to *any* of the instructions governing the jury's determination of punitive damages; it merely objected to any instruction at all being given on punitive damages. Tr. 25:2959. Nor did Honda object to the jury being informed of its wealth, as part of its punitive damages deliberations.[2] Nor did Honda preserve any objection to reference by Oberg to "tens of thousands of persons" who suffered similar injuries, or in many cases death, from ATVs produced by Honda. Pet. 2-3. Further, Honda expressly waived the right it enjoyed under Oregon law to an instruction referring to "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damages awards to persons in situations similar to the plaintiff's." ORS 30.925(3)(g). See note 10, *infra*.

Although the twelve-person jury did not accept Honda's sweeping "blame the rider" defense completely, it did find some fault on both sides; it found Oberg 20 percent at fault for the accident and Honda 80 percent at fault. As compensation for Oberg's medical expenses, lost earnings and pain and suffering, the jury awarded $919,390.39, reduced to $735,512.31 in light of Oberg's partial fault. The jury also found that Honda was guilty of wanton misconduct and that a punitive damages award

---

[2] Oberg was not allowed to introduce evidence regarding Honda's financial condition until he "presented evidence sufficient to justify . . . a prima facie claim of punitive damages." ORS 41.315(2). At trial, Honda did not preserve any objection that "Oberg's counsel . . . emphasized during his closing argument that Honda's net worth was some $4.9 billion." Pet. 3 (citing Tr. 24:2838). In fact, Honda explicitly approved a stipulation concerning the total wealth represented by all of Honda's lines of business, prepared by Oberg, which Honda said was "acceptable as is," and which informed the jury: "If witnesses were called, the evidence would establish that the net worth of the defendant Honda companies is $4.9 billion." Tr. 23:2703. This was duly read to the jury. *Id.* Later, Honda chose not to object to the jury charge instructing the jury to take into account this stipulated wealth figure in setting punitive damages. Tr. 25:2959-60.

of $5 million was necessary to deter misconduct by Honda and others in the future.

Honda filed extensive post-trial motions, which were denied by the trial court. Honda reiterated its challenges to the verdict in the Oregon Court of Appeals and again in the Oregon Supreme Court. This Court granted certiorari and held that the Oregon courts had failed to provide judicial review of the amount of punitive damages awarded by the jury, and that such a practice was inconsistent with the Due Process Clause of the Fourteenth Amendment. *Oberg*, 114 S. Ct. 2331 (1994).

On remand, the Oregon Supreme Court entertained extensive briefing and argument. It declined to send the case back to the trial court in the first instance, explaining that "the judgment was entered more than five years ago; we see no reason to delay the final resolution of this case any longer." Pet. App. 8a. In a decision dated Feb. 2, 1995, the Oregon Supreme Court unanimously affirmed its prior judgment, holding that there was ample evidence in the record to support the jury's $5 million punitive damages award. Pet. App. 10a-13a.

REASONS FOR DENYING THE WRIT

Pursuant to 28 U.S.C. § 1257(a), this Court will not consider claims that were not raised before or passed on by the state court whose judgment it is asked to review. In cases arising from state court, this rule is jurisdictional in nature. *See, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-77 (1988); *id.* at 85 (White, J., concurring); *id.* at 89 (Scalia, J., concurring in part and in the judgment). Implementing this principle, Rule 14.1(h) of this Court requires a petition for certiorari to specify in the statement of the case:

> [T]he stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the

> record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

See, e.g., *Webb v. Webb*, 451 U.S. 493, 495 (1981).

As to each of the federal issues raised by Honda's petition, Honda has utterly failed to comply with this rule. For example, Honda claims that the Oregon Supreme Court held below "that judicial review of *compensatory* damages remains unavailable in Oregon," Pet. 2; *see also id.* at 6-9, without quoting any language supporting this assertion, and without demonstrating that Honda timely raised a federal constitutional objection to any such rule. Honda claims that the Oregon Supreme Court "reject[ed] an excessiveness claim that is similar in many respects to the one now before the Court" in *Gore*, *id.* at 2, without citing any examples of these supposedly "many respects," and without demonstrating that Honda preserved the federal issues that are being raised in *Gore*. In particular, Honda complains that the jury was urged at trial to punish Honda for injuries done to tens of thousands of others nationwide, *id.* at 2-3, without showing that it timely preserved a federal objection to such an argument. Honda appears to complain about overly vague jury instructions that required the jury to "'apply [its] own considered judgment to determine the amount,'" *id.* at 3 & n.2 (quoting Tr. 24:2942), without demonstrating that it preserved a federal objection to the instructions. These deficiencies are easily explained: Honda simply failed to preserve its arguments at the state court level.

The constraints on the exercise of this Court's jurisdiction reflected in 28 U.S.C. § 1257(a) and in Rules 14.1(h) and 14.5 dictate that Honda's petition should be rejected on the basis that Honda has not met its affirmative burden to show, in the petition itself, that the federal issues on which it seeks review were timely preserved in the state court. Granting Honda's request that this case be held based on arguments that Honda might

attempt to raise for the first time in its reply would encourage petitioners to flout the rules in an effort to secure a strategic advantage over respondents, by denying them a chance to respond to arguments over jurisdictional facts. Although respondent Karl Oberg has no obligation to address these issues, the remainder of this brief summarizes Honda's failure to preserve its federal issues below, clearly necessitating a prompt denial of certiorari.

I. THE FIRST QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTION TO THE COMPENSATORY AWARD

1. Honda claims that the Oregon Supreme Court held that compensatory damage awards "remain unreviewable in Oregon," Pet. 5 (quoting Pet. App. 4a n.6), and argues that this unreviewability violates due process. *Id.* at 6-9. The Oregon Supreme Court held no such thing, as the very footnote cited by Honda on this point makes clear.

In its decision unanimously affirming the judgment below, the Oregon Supreme Court explicated "the standard for post-verdict judicial review of an award of punitive damages," in the wake of this Court's decision in *Oberg*. Pet. App. 7a. Just before laying out that standard, however the court indicated in a footnote: "This holding is limited to awards of punitive damages and does not extend to compensatory damages." Pet. App. 4a n.6. Thus, the Oregon Supreme Court elected not to explicate the standard of review for compensatory damages. The court issued *no holding* on the subject of compensatory damages review. There is nothing in this footnote that indicates an actual holding of the court that *no* judicial review of compensatory damages is available in Oregon.

2. The reason for the Oregon Supreme Court's decision not to discuss the standard for post-verdict review of compensatory damages is plain: that issue had long before been waived in this case. Honda did not assert a due process claim with respect to the compensatory award until it sought

discretionary review in the Supreme Court of Oregon in the *first* round of appellate proceedings in this case. Honda did not advance any such claim in the trial court, nor did it assign the point as error in the Oregon intermediate appellate court. Therefore, it is clear as a matter of Oregon law that the issue had been doubly waived by the time the case reached the Oregon Supreme Court for the *first* time. *See, e.g., In re Quinn*, 881 P.2d 795, 800 (Or. 1994).[3]

When this case was previously before this Court, Oberg repeatedly pointed out Honda's procedural default. *See* Br. in Opp. Cert., in No. 93-644, at 2, 10 (Dec. 1993); Br of Respondent in No. 93-644, at 12 n.13 (Apr. 1, 1994). Even Honda admitted that the Oregon courts had not passed on its tardy challenge to the compensatory award. Br. of Petitioner in No. 93-644, at 8 (Feb. 1994). Nor did this Court's ruling in *Oberg*, 114 S. Ct. 2331 (1994), pass on Honda's challenge to the compensatory award.

3. If Honda had a federal objection to the Oregon system for reviewing compensatory damages, it was obligated to present a timely objection as required by state procedural rules. The Oregon Supreme Court's refusal to address any federal issues involving compensatory damages review must be presumed to be "due to want of proper presentation in the State courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (citations and internal quotations omitted). *See also Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974); *Street v. New York*, 394 U.S. 576, 582 (1969); *Chicago, I. & L. R. Co. v.*

---

[3] Or. R. App. P. 5.45(2) provides that "[n]o matter assigned as error will be considered on appeal unless it was preserved in the lower court and assigned as error in the party's opening brief." *See, e.g., Don't Waste Oregon Comm. v. Energy Facility Siting Council*, 881 P.2d 119, 129 (Or. 1994); *State v. Cunningham*, 880 P.2d 431, 441 n.17 (Or. 1994), *cert. denied*, 115 S. Ct. 1317 (1995); *State v. Pinnell*, 877 P.2d 635, 639 (Or. 1994); *State v. Bucholz*, 855 P.2d 1100, 1106 (Or. 1993); *State v. Langley*, 839 P.2d 692, 697 (Or. 1992); *Ailes v. Portland Meadows, Inc.*, 823 P.2d 956, 958 (Or. 1991); *State v. Brown*, 800 P.2d 259, 265-66 (Or. 1980).

McGuire, 196 U.S. 128, 131-33 (1905). Honda has made no attempt at this showing, nor could it. Certiorari on this ground is therefore ruled out.

II. THE SECOND QUESTION IS NOT PROPERLY PRESENTED, FOR HONDA DID NOT PRESERVE BELOW ITS FEDERAL OBJECTIONS TO THE PUNITIVE AWARD

Honda contends that the punitive award in this case is excessive and that the petition should be held pending the disposition of *BMW of North America, Inc. v. Gore*, No. 94-896. Honda's arguments have no merit and are a transparent attempt to further delay payment on a judgment that has been outstanding for six years. Pet. App. 8a.

1. Honda's arguments to this Court are precisely contrary to its position before the Oregon Supreme Court, where it sought a remand to the state trial court — and further delay — on the ground that "there are neither findings by the lower courts nor full briefing before this Court on the relevant issues."[4] Honda claimed that excessiveness review "would [not] . . . be [a] simple matter" and that the parties' treatment of the excessiveness issue was so "abbreviated" that the Oregon Supreme Court should not reach it.[5] If this case is not suitable for excessiveness review by the Oregon Supreme Court, it is difficult to fathom how it could possibly be suitable for review by this Court in the first instance.

2. Honda did not meet established requirements for framing *any* federal constitutional claim before the Oregon Supreme Court. On remand from this Court, Honda urged that the punitive award was "excessive" because, for example, the company's conduct was supposedly not sufficiently reprehensible,[6] but Honda did not specifically cite *any* federal

---

[4] Honda Reply Supp. Br. on Remand at 14 (filed with Or. S. Ct. Sept. 6, 1994).

[5] *Id.* at 11, 12.

[6] Honda's First Supp. Br. on Remand, at 13 (filed Aug. 24, 1994) ("it is plain that defendants' conduct barely registers on the culpability scale. Plaintiff did not allege that defendants acted with intention to cause harm").

constitutional provision with respect to its excessiveness argument. Honda used the term "excessive," but it quite deliberately invoked a mish-mash of "common law principles announced by [the Oregon Supreme Court] and other courts."[7] Honda had previously advised this Court that its excessiveness claim was solely under state law,[8] and on remand Oberg pointed out to the Oregon Supreme Court, without contradiction, that all Honda was requesting was judicial review under state-law standards.[9]

It is well-settled that arguing simply that an award is "excessive" is inadequate to frame a federal constitutional claim. *Bankers Life & Cas. Co.*, 486 U.S. at 77-78; *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723-24 (1993) (plurality opinion). Indeed, a "vague appeal to constitutional principles" or even "'[a] generic reference to the Fourteenth Amendment,'" *Bankers Life & Cas. Co.*, 486 U.S. at 77 (internal quotation omitted), is inadequate. Here, as in *Bankers Life*, the "failure to invoke the Federal Constitution is especially problematic" because "even if the [state] supreme court understood [Honda] to be offering a constitutional challenge, it may well have taken that challenge to be anchored in" state law. 486 U.S. at 78.

---

[7] Honda's First Supp. Br. on Remand, at 13 (filed with Or. S. Ct. Aug. 24, 1994).

[8] *See* Reply Br. of Petitioners in No. 93-644, at 1-2 (Apr. 13, 1994) (under "the 'excessiveness review' that Honda believes is required by the Due Process Clause . . . a court would remit or set aside an award that no reasonable jury could have found to be proper compensation or appropriate punishment under the criteria established by state law"); Transcript of Argument, No. 93-644, at 4-5 (Apr. 20, 1994) (Honda's objection is that Oregon courts "lack[] the power to consider whether [punitive damage awards] conform to the law of Oregon," and Honda is "not saying in this case that the State of Oregon, or that the other States . . ., have to have any particular substantive law of damages").

[9] *See* Oberg's Second Supp. Br. on Remand, at 6 n. 9 (filed with Or. Sup. Ct. Sept. 6, 1994) (collection Honda's representations on this point).

To be sure, after this Court granted certiorari in *BMW of North America, Inc. v. Gore*, No. 94-896, Honda filed a petition for reconsideration with the Oregon Supreme Court raising the excessiveness issues it now seeks to present to this Court. But it is elementary that raising a federal question for the first time in a petition for rehearing is inadequate unless the state court actually entertains the petition and expressly decides the question. The Oregon Supreme Court's summary disposition of the petition in this case did not preserve Honda's claims. R. Stern, *et al.*, SUPREME COURT PRACTICE § 3.21(c) (7th ed. 1993).

3. There are further reasons that none of the specific excessiveness issues Honda raises in the petition for certiorari is properly presented.

a. There is no "multiple punitives" issue in this case. At trial, Honda affirmatively declined to invoke the protection of ORS 30.925(3)(g), which provides that the assessment of punitive damages awards must consider "[t]he total deterrent effect of other punishment imposed on the defendant as a result of his misconduct." Honda took the position that this provision was inapplicable because there had been no previous punitive awards against Honda based on its misconduct.[10]

At trial, Honda never attempted to place into the record any documentary materials relating to additional litigation against Honda based on its defective ATVs. Further, Honda represented to the Oregon Supreme Court on remand that the Oregon punitive damages scheme *already* provided protection against multiple awards for the same course of misconduct.[11] Honda

---

[10] Honda argued to the trial court that, because there had been no previous punitive awards, the provision "is, under the current state of the evidence, not applicable." Appendix A to Oberg Or. S. Ct. Br., at App-2 (filed Dec. 31, 1991).

[11] Honda argued that "this Court has itself recognized the 'potentially onerous effects of multiple awards of punitive damages,' noting that the problem may be addressed by, among other things, 'remittitur' and consideration by the factfinder 'of prior and potential punitive awards in each case.'" Honda's First Supp. Br. on Remand 34 (filed with Or. S. Ct. Aug. 24, 1994) (quoting *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1272

raised no argument that the award in this case constituted a violation of federal substantive due process.

It is absurd for Honda now to argue that "a $5 million award to Oberg could be justified only if total punitive damages of *$25 billion* would not be excessive for Honda's course of conduct." Pet. 11 (emphasis in original). The Oregon court's decision obviously implies no such thing. In fact, there is every reason to presume that the Oregon Supreme Court would have addressed Honda's concerns, if Honda had actually raised any federal claim. After all, in its decision, the Oregon Supreme Court noted the Oregon statutory provision limiting multiple awards against a defendant for the same course of conduct. Pet. App. 10a.

In any event, this case is an extremely poor vehicle to examine the "multiple punitives" argument. As Honda admits, it has not paid any punitive damages for its defective ATVs in any other case that has proceeded to finality. Pet. 11. Whether any additional punitive awards will be imposed is entirely speculative, since three-wheeled ATVs are no longer on the market. If in the future Honda faces the threat of excessive multiple punishment, it can then raise a constitutional objection.

b. Nor is there any merit to Honda's claim of "extraterritorial punishment." This claim was never raised in the Oregon courts below, even during the first appeal prior to this Court's decision. It plainly has been waived.

Furthermore, the argument has no merit. Honda selectively quotes portions of Oberg's closing argument at trial, but fails to mention that it raised no relevant contemporaneous objection to that argument. Nor did Honda raise any objection to the jury

---

(Or. 1980)). Citing ORS 30.925(3)(g), Honda contended that "[t]he Oregon Legislature also has specified that determination of a punitive award in a products liability action must take account of '[t]he total deterrent effect of other punishment imposed on the defendant as a result of the misconduct.'" *Id.*

instructions.[12] Moreover, the Oregon Supreme Court understood that the evidence of thousands of injuries resulting from ATV use had been employed not to punish Honda for other acts but rather to prove the malicious and reprehensible nature of Honda's misconduct, by illustrating that Honda had been on notice of safety problems and yet had done very little to prevent Oberg's accident:

> Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death. *See* ORS 30.925(3)(a) & (b) [statutory factors providing that punitive damages should be imposed on "[t]he likelihood at the time that serious harm would arise from the defendant's misconduct" and "[t]he degree of the defendant's awareness of that likelihood"].

Pet. App. 10a.

Honda cites the state court's observation that ATVs caused "'numerous injuries.'" Pet. 10 (citing Pet. App. 11a). But this selective quotation is deceiving, for in context the Oregon court was discussing Honda's culpability for the injury to Oberg, not holding that Honda could be punished directly for these other injuries:

> There was evidence that, when plaintiff's injury occurred, defendants had notice, from the federal government agency investigating the safety of ATVs, that *numerous injuries were occurring* from the use of ATVs and that many of those injuries resulted from rearward tip-overs. According to the evidence, defendants maintained that there

---

[12] In any event, the instructions were entirely proper. The jury was instructed emphatically and repeatedly that the information received from the Consumer Products Safety Commission (which did not mention any action taken or conclusions drawn by the agency) was only to be considered as notice to Honda that there was a safety issue related to vehicle overturns, not as evidence of any defect. Tr. 25:2959; *Oberg*, 851 P.2d at 1095 n.11.

> was nothing wrong with the design or testing of the product and that there was no reason to add safety mechanisms or to engage in safety tests to avoid the type of accident suffered by plaintiff.

Pet. App. 11a (emphasis added). Honda cites only the italicized portion of this language.

This case bears no resemblance to *Gore*, where petitioner BMW (represented by the same counsel of record who represents Honda in this case) has conceded that "evidence of similar acts of misconduct (wherever they occurred) traditionally has been considered relevant in assessing the reprehensibility of the misconduct at issue." Brief of Petitioner in *BMW v. Gore*, No. 94-896, at 22 (filed Mar. 1995). BMW has emphasized that it "raise[s] no claim in this case that the mere admission of extraterritorial transactions violate[s] [a defendant's] rights." *Id.* "Nor is there any issue here of the consideration of similar acts of out-of-state misconduct in gauging the appropriate punishment for the defendant's in-state activities." *Id.* Rather, BMW's argument is that *Gore* is an especially extreme case where "the Alabama Supreme Court has found that the jury directly punished BMW for its out-of-state conduct by using the total number of sales of refinished vehicles as a multiplier." *Id.* at 22-23. That is, *Gore* involves "direct extraterritorial punishment," *id.* at 23, where a jury multiplied the total number of a defendant's fraudulent acts (even those occurring out-of-state) by the defendant's gain from each transaction.

Plainly, no such multiplication occurred in this case, nor did the Oregon Supreme Court purport to uphold the award on such a basis. The award here is based on Honda's conduct with respect to Oberg, and Oberg alone. *Gore* has nothing to do with this case.

c. Honda also claims that the punitive award here is excessive because "it is [allegedly] far 'greater than reasonably necessary to punish and deter.'" Pet. 12 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)). As we have noted, Honda failed to preserve a federal claim on this issue, and

it also insisted before the Oregon Supreme Court that the record was too sketchy to serve as a good vehicle for appellate review. Moreover, it is apparent that the decision in this case is a fact-specific application of the principles of *Haslip* and *TXO* and does not warrant this Court's review.[13]

Nor does the excessiveness issue bear any relationship to the issues presented in *Gore*. Unlike the award in the *Gore* case, the punitive award here was imposed and reviewed according to a detailed state legislative scheme that prescribes seven criteria that must be considered by state courts and juries in assessing and evaluating punitive awards at trial and on appeal. Pet. App. 9a-10a. There can be no question that the Oregon Supreme Court faithfully applied these standards, as well as this Court's decisions in *Haslip* and *TXO*, in determining the reasonableness of the instant award. Pet. App. 10a-13a. The distorted arguments recycled by Honda in its Petition for Certiorari (at 12-15) were all considered and rejected by the Oregon Supreme Court (albeit as state-law claims).[14] Nothing in *Gore* could possibly alter the Oregon court's analysis. Nor could there be any reason to send this case back to the Oregon courts to give

---

[13] There is a powerful reason for this Court *not* to engage in any fact-based review of the punitive award in this case: this Court is bound by the Re-Examination Clause of the Seventh Amendment and would be precluded from re-examining the jury's verdict according to such evidence. *See Capital Traction Co. v. Hof*, 174 U.S. 1, 12 (1899); *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 242-43 (1897). Virtually the entirety of Honda's "excessiveness" challenge (Pet. 12-15) consists of information that this Court would be unable to consider.

[14] For example, Honda's attempt to claim exoneration from the CPSC's termination of rulemaking (Pet. 14-15) is fanciful. A total recall of all three-wheeled ATVs (the type at issue here) was deemed not cost-effective only because of the continuing improvement of safety resulting from the existing ban on sales of new three wheelers and the fact that such a recall would result in protracted litigation, at whose conclusion few three wheelers would remain in use in any event. *See* 46 Fed. Reg. 47173. Far from taking no action against ATVs, the Commission left in place the results of its strenuous and successful action to alleviate the threat to public safety posed by new three wheelers, including a ban on sales of new three wheelers and a public information campaign as to existing ones. It also pledged to continue monitoring efforts and reserved the possibility of future action if needed.

Honda yet another opportunity to raise the same tired arguments again.

CONCLUSION

Honda has not complied with this Court's jurisdictional rules; further, the federal issues it seeks to raise, on the basis of which it asks that this case be held pending disposition of *Gore*, were not timely preserved in the state courts below. Certiorari therefore should be denied.

Respectfully submitted,

Raymond F. Thomas
Royce, Swanson,
Thomas & Coon
621 SW Morrison Street
Portland, OR 87205

William A. Gaylord
Counsel of Record
Gaylord & Eyerman, P.C.
1400 SW Montgomery
Portland, OR 97201
(503) 222-3526

Counsel for Respondent

May 30, 1995

(3)

No. 94-1890

SUPREME COURT, U.S.
FILED
JUN 8 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., *Petitioners*

v.

KARL L. OBERG, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF FOR THE PETITIONERS

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES A. ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brook
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85103
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for the Petitioners 1

Conclusion 6

TABLE OF AUTHORITIES

Cases **Pages**

BMW of North America, Inc. v. *Gore*, No. 94-896 . . . . . 3, 4, 7

Exxon Corp. v. *Eagerton*, 462 U.S. 176 (1993) 6

Harris v. *Reed*, 489 U.S. 255 (1989) 6

Michigan v. *Long*, 463 U.S. 1032 (1983) 6

Orr v. *Orr*, 440 U.S. 268 (1979) 2

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 2, 4

Raley v. *Ohio*, 360 U.S. 423 (1959) 2

TXO Production Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) 2

Miscellaneous

R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (7th ed. 1993) 2

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1890

HONDA MOTOR CO., LTD.; HONDA R & D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., *Petitioners*

v.

KARL L. OBERG, *Respondent*

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

---

REPLY BRIEF FOR THE PETITIONERS

In opposing the petition for certiorari, Oberg makes virtually no attempt to demonstrate that the issues presented do not warrant review. Instead, he largely confines himself to the improbable contention that none of the federal constitutional questions raised in the petition were preserved below. While Oberg deserves exceptional grades for creativity, his contention dismally flunks the more important test of accuracy.

1. Entirely apart from any arguments made below by Honda, it is beyond dispute that on remand from this Court the Oregon Supreme Court expressly considered and *in fact decided* the question whether the punitive damages award in this case is so large as to violate the substantive component of the Fourteenth Amendment's Due Process Clause. Oberg pointedly does not contend otherwise.

The court below thus explained that punitive awards are subject to review "to ensure that [they are] within the permissible range of damages (which is limited by substantive due process concerns)." Pet. App. 7a. Relying on *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1 (1991), and *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), the Oregon Supreme Court proceeded to inquire whether the judgment here is consistent with the "substantive limit on the size of punitive damages awards" established by "the Due Process Clause of the Fourteenth Amendment." Pet. App. 12a. The court upheld the award because "it is neither unreasonable nor grossly excessive in light of * * * the awards upheld against federal due process challenges in *Haslip* and *TXO Production*." *Id.* at 13a. That is enough to dispose of respondent's claim of waiver regarding the punitive award; it is of course settled that "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio*, 360 U.S. 423, 436-437 (1959). See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* 131 (7th ed. 1993).[1]

2. There can be no doubt — and Oberg does not deny — that the jury sanctioned Honda for injuries suffered by *other* ATV users who may themselves be entitled to seek punitive damages; he hardly could contend otherwise when his counsel expressly urged the jury to punish Honda "on behalf of hundreds, maybe thousands of other victims." Tr.

---

[1] Not surprisingly, it may be added that Oberg is wrong in contending (at Br. in Opp. 8-9) that petitioners did not raise their federal constitutional claim in the court below. Petitioners described at considerable length the *substantive* limits on punitive awards that are compelled by both "constitutional and common law principles" (Honda's First Supp. Br. on Remand 30; see *id.* at 30-39) before demonstrating that the punitive award in this case is excessive. See *id.* at 45-47.

24:2760. See Pet. 10. In this setting, Oberg's contention that "[t]here is no 'multiple punitives' issue in this case" because "there had been no previous punitive awards against Honda based on its misconduct" (Br. in Opp. 10) simply misses our point. As we explain in the petition (at 11-12), the unfairness of punishing a defendant for injuries caused to others is *especially* apparent when the actions causing those injuries have themselves been held *not* to warrant punishment. Oberg makes no response to this argument, and does not deny that this very issue is now before the Court in *BMW of North America, Inc.* v. *Gore*, No. 94-896.

3. Oberg is wrong for similar reasons in contending (at Br. in Opp. 11-13) that there is no issue of extraterritorial punishment in this case. In fact, it is plain that such punishment was imposed by the jury, which was urged to sanction Honda "on behalf" of other ATV users, most of whom live outside Oregon. Oberg therefore is incorrect in stating that this is a case where the jury considered evidence of other injuries simply "'in assessing the reprehensibility of the misconduct at issue'" (Br. in Opp. 13 (citation omitted)); instead, Oberg's counsel expressly asked the jury to punish Honda "on behalf" of other (principally out-of-state) victims. And as Oberg acknowledges, this issue — the propriety of such "'direct extraterritorial punishment'" (Br. in Opp. 13 (citation omitted)) — also is before the Court in *Gore*.

4. Oberg is wrong in contending (Br. in Opp. 14) that Honda's argument regarding excessiveness here "does not bear any relationship to the issues presented in *Gore*" because "the punitive award here was imposed and reviewed according to a detailed legislative scheme." In fact, the Oregon legislative scheme is substantially similar to the common-law *Green Oil* test used by the Alabama Supreme Court to review the punitive award in *Gore*. Compare Pet. App. 9a-10a with *Haslip*, 499 U.S. at 21-22 (describing *Green Oil* test) and *Gore* Pet. App. 8a-21a. The Court's

resolution of the excessiveness argument in *Gore* therefore is sure to have a significant bearing on this case.[2]

5. Oberg does not deny that the question whether due process principles require judicial excessiveness review of compensatory damage awards is an important one that warrants review. Instead, he confines himself to the argument that Honda's contentions regarding the excessiveness of the compensatory award were neither presented to nor passed upon by the courts below. Br. in Opp. 6-7. This contention is plainly wrong.

On remand from this Court, Honda argued expressly and at length that "the federal Constitution requires such excessiveness review [of compensatory awards]" (Honda's First Supp. Br. on Remand 42-43; see *id.* at 42-45) and that the compensatory award here is in fact excessive (see *id.* at 47-48). In rejecting the first of these arguments, the court below did not, as Oberg would have it, "refus[e] to address any federal issues involving compensatory damages." Br. in

---

[2] Oberg misrepresents the proceedings below when he contends (Br. in Opp. 14; see also *id.* at 8) that Honda "insisted before the Oregon Supreme Court that the appellate record was too sketchy to serve as a good vehicle for appellate review." Honda never said that the record was sketchy; instead, it suggested, as a matter of sound judicial administration, that the Oregon Supreme Court first "set[] out the principles that are to govern future excessiveness review in Oregon" and then "remand the case to the trial court so that it may make the initial determination regarding excessiveness." Honda First Supp. Br. on Remand 48. Honda made this suggestion because "there are neither findings by the lower courts nor full briefing before [the Oregon Supreme Court] on the relevant issues." Honda Reply Supp. Br. on Remand 14. As the Oregon Supreme Court rejected Honda's suggestion and itself made the requisite findings in resolving the excessiveness question, there is nothing about the record or decisions below that would handicap this Court in its review of that judgment.

Opp. 7. And that court did not mention the word waiver. Instead, the Oregon Supreme Court, after stating that awards of punitive damages are reviewable for rationality, declared that "[t]his holding is limited to awards of punitive damages and does not extend to compensatory damages." Pet. App. 4a n.6. This declaration makes sense only as a statement that compensatory awards simply are not reviewable under *any* standard.[3] That conclusion is confirmed by the Oregon Supreme Court's denial without comment of Honda's petition seeking reconsideration of the "holding that the amount of compensatory damages remains unreviewable in Oregon." Reh'g Pet. 2 n.2.

The decisions cited by Oberg at Br. in Opp. 7-8 are wholly off the point. Those holdings stand for the proposition that a state court's failure to say *anything* about a federal claim will be (rebuttably) presumed "due to want of proper presentation in the State courts." *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1993) (citation and internal quotation marks omitted). Here, in contrast, the state court expressly did address and reject the federal claim.[4]

---

[3] The court below could hardly have meant by this, as Oberg suggests (at Br. in Opp. 6 (emphasis added)), that it simply "elected not to explicate the *standard of review* for compensatory damages." The minimal rationality review embraced by the Oregon Supreme Court for the assessment of punitive damages is the lowest level of scrutiny that is consistent with the Due Process Clause; the court below therefore could not have meant to suggest that the excessiveness review of compensatory damages might proceed under some *lower* standard. And so far as we are aware, no court has ever made the counter-intuitive suggestion that compensatory judgments should be subjected to *more* intensive scrutiny than that applied to punitive awards. Oberg's reading of the opinion below therefore is nonsensical.

[4] If there is any ambiguity here, this case — where the state court expressly mentioned the federal claim — calls for application

Moreover, this Court already has rejected Oberg's related contention (see Br. in Opp. 6-7) that in the first round of proceedings in this case, Honda waived its claim regarding reviewability of compensatory damages. Honda's first petition for certiorari presented the question "[w]hether Oregon's denial of any judicial review of *compensatory* and punitive damages verdicts for excessiveness violates the Due Process Clause of the Fourteenth Amendment." No. 93-644, Pet. i (emphasis added). Opposing review, Oberg maintained that Honda had waived its argument concerning compensatory damages. In its reply, Honda demonstrated that the argument had not been waived (No. 93-644, Pet. Rep. Br. on Cert. 8 & n.9), although Honda also noted that if Oberg were correct the Court could "limit[] the grant of review to the punitive component of the judgment" (*id.* at 7). This Court subsequently granted review without limitation, an action that must have been based on the determination that the arguments regarding compensatory damages had not been waived. Against that background, Oberg necessarily is wrong in contending the Oregon Supreme Court's failure to review the compensatory award on remand rested on a finding of waiver.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

---

of a very different presumption: federal jurisdiction is presumed to exist "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). As the Court has explained, "[t]he *Long* 'plain statement' rule applies regardless of whether the disputed state-law ground is substantive * * * or procedural * * *. Thus, the mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." *Harris* v. *Reed*, 489 U.S. 255, 261 (1989).

Alternatively, the Court should hold the petition pending disposition of *BMW of North America, Inc.* v. *Gore*, No. 94-896, and should dispose of this case as appropriate in light of the decision in *Gore*.

Respectfully submitted.

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Thirteenth Floor
Bank of America Financial
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
CHARLES A. ROTHFELD
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brook
Suite 2100
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85103
(602) 248-0899

Counsel for Petitioners
**Counsel of Record*

JUNE 1995